No. 77-652

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

LEWIS NATHANIEL DIXON, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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The Memorandum of the United States in Opposition attempts to distinguish petitioner's case from application of United States v. Chadwick, No. 75-1721, decided June 21, 1977, on three theories:

1) The government contends that the Chadwick search was remote in time and place from the arrest (M.O. 3); the Dixon search was not. This ignores the fact

that the Chadwick "seizure" was incident to an arrest and that this Court specifically declined to limit its ruling in Chadwick to only those cases where the object seized "incident to" was searched at a remote time and place. However, in Dixon, the arresting agent testified he could not and did not see what was in the paper bag seized at the time of the arrest (RT 242). The agent who then took custody of the bag (RT 221) did not testify to examining the bag at the scene. The record appears to support the inference that the bag may not have been examined until the agents reached their offices in San Francisco (RT 205).[1]

1/ The unfortunate state of the record as to such detail exists because a noticed pretrial motion to suppress was never heard pre-trial and no one at trial sought to examine or cross-examine on the details of who looked at or into the bag when the heroin, concealed inside the bag, was examined.

There is nothing in the record to support a finding that the bag was searched at the scene. It is likely it was not. The conversations by Dixon with informant Hudson, overheard on the body recorder by agents, led toward this meeting only for the purpose of a delivery of heroin by Dixon to Hudson. Hudson told the agents Dixon had the heroin in the car and the overheard conversation at the car corroborated this. Thus, a "field test" or examination of the powder might not have been conducted at the scene. If, as the government contends, the locale of the arrest and presence of others, including a "known heroin addict" (M.O. 3) presented any risks, the examination of the bag could well have been delayed to a time and a place more convenient to agents. The situation would then be on all fours with Chadwick.

2) The government contends that Chadwick presented no facts where "The person arrested may seek to use a weapon or . . . evidence may be concealed or destroyed." United States v. Chadwick, supra, Slip Op. 12 (M.O. 3); while Dixon, does present such facts. This is not correct: Petitioner, who arrived alone in his auto, was arrested at a pre-arranged combined DEA/local law enforcement "stake out". As the government notes, there were many people present, but many were law enforcement officers. The "known heroin addict" referred to by the government (M.O. 3) was apparently either the cooperating DEA informant Willie Hudson, who arranged for the sale on behalf of the government and gave the signal for agents to move in and arrest Dixon (RT 78, 84-85, 90-112, 118-131), or some people inside a house well removed from the arrest area at the critical time (RT 126-

129). The "body recorder" worn by Hudson transmitted a conversation he had with some other people on the street prior to the arrest (RT 127); however, a gap in time occurred until he gave the signal to DEA agents to move in and there is no evidence that any people besides agents, Dixon and Hudson were on the street near the Dixon vehicle at the point of arrest[2] (RT 127-130).

By the time anyone saw the package (later found to contain heroin) inside the car, Dixon had been removed totally away from the area of the driver/

2/ Hudson was, at the time of arrest, across the street away from Dixon (RT 174), having moved to his own car to raise the hood (the signal for agents to move in and arrest Dixon) and to be placed under "simulated arrest" (RT 130-131). Dixon's vehicle was on a dead-end street (RT 194) so that flight was difficult. The observation of the agent that five to ten people were walking in the general vicinity (RT 195) [apparently one or two were children (RT 220)] was followed by a three to five-minute period before Hudson gave any signal (RT 196).

passenger compartment, frisked and handcuffed. He was totally unable to use a weapon or to take any action to conceal or destroy evidence. Chimel is thus inapplicable.[3]

3) The government contends that the warrantless search was an automobile search or forfeiture search. The theory of forfeiture (of both containers and the auto) was advanced by the government in Chadwick and was based upon the same statutory provisions noted in the Memorandum in Opposition here, p. 4 (Brief for the United States in Chadwick, 48-49).

3/ The then-Solicitor General in Chadwick conceded that Chimel was limited to areas where the defendant had actual immediate control (Brief for the United States, 50-51). Dixon is no different than Chadwick in this respect.

The theory of the automobile search doctrine was put forth in Chadwick with vigor (Brief for the United States, 12, 13, 35, 36, 38, 39, 43, 55). Neither was accepted by this Court.

Respectfully submitted,

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